IN THE

Supreme Court of the United States

October Term, 1955

No. 510.

GUS O. BROWN and OSCAR CASTRO, individually and as Business Agents of Local Union 576, United Furniture Workers of America, CIO, a voluntary unincorporated association; ERNEST MARSH and HENRY B. HOLMES, individually and as organizers of Local Union 576, United Furniture Workers of America, CIO, a voluntary unincorporated association; KRUGER CLARK, LAWRENCE TURNER, JACOB LEHMAN, SOL STEINHARD, DAN QUIJARDA, PETER BEEKES, LOUISA TOCCI, MARK ROBINSON, JOE N. OLIVER, and ROBERT BURRI, individually and as officers and agents of Local Union 576, United Furniture Workers of America, CIO, a voluntary unincorporated association, FURNITURE WORKERS, UPHOLSTERERS AND WOOD WORKERS UNION, Local 576 (INDEPENDENT), a voluntary unincorporated association; LOUIS COTA, JR., individually and as President thereof; GUILLERMO NAVARROS, individually and as Financial Secretary thereof; HENRY MOBLEY, individually and as Treasurer thereof,

Petitioners,

vs.

MORRIS PIZER, individually and as International President, and WILLIAM GILBERT, individually and as International Representative of and Members and representatives of the members of the United Furniture Workers of America, a voluntary unincorporated association, ALEX O. RIVERA, FRANK JONES, GEORGE B. TRIPP, FRANCES CARR, CHRIS LAGUTARIS, and ETHEL KIGGINS, individually and as members of and representatives of the members of Local Union 576, United Furniture Workers of America, CIO, a voluntary unincorporated association,

Respondents.

PETITIONERS' REPLY BRIEF.

1. By the expedient of ignoring the entire foundation of the Petition herein, respondents argue that there is no federal question in this case and, if there is, it should have been but was not raised in the trial court.

The basis for the relief requested by the International was the forfeiture clause in its constitution [Clk. R. 1, 10, 24-5]. In their answer and cross-complaint, the peti-

tioners pleaded facts showing a deliberate attempt on the part of the International to destroy 576 CIO, constituting a breach of the contract with the local by reason of which the International could not enforce against the local the forfeiture clause in the same contract [Clk. R. 42, 46, 50-53].

The contract between the parties was crystal clear with respect to the obligation of the International to assist the local and not to take steps to destroy it. On this issue there was no dispute. If the trial court had made a finding that it was true that the International had attempted to destroy the local but that the local was not entitled to have its contract rights protected because it allegedly followed the Communist line, then there would have been presented at that point the issues to which the decision of the Court of Appeal gave birth. But the trial court merely found without opinion that these critical allegations were untrue. So at that point, there were no constitutitional issues apparent.

Petitioners' contention on appeal was that the finding that the International had not sought to ruin the local was contrary to the uncontradicted evidence. Respondents in their brief and argument in the Court of Appeal did not challenge the accuracy of petitioners' statement setting forth, as uncontradicted, facts supported by the International's own records conclusively establishing that the International attempted to destroy the local. Nor did they contend that the International had a right to destroy the local because of its alleged following of the Communist Party line. Accordingly, the matter was submitted to the Court of Appeal with petitioners' contention regarding the state of the record on this point unchallenged and unanswered.

While the case was pending in the Court of Appeal, the State Supreme Court decided *Black v. Cutter Laboratories*, 43 Cal. 2d 788. In its decision in this case the Appellate Court declared that the International had a right to take the action it did against the local, citing the *Black* case (App. B to Pet. p. 12). This was said in the face of the undenied fact that the record established without contradiction that the International had embarked upon a campaign to destroy the local. Thus there entered the case for the first time the federal constitutional issues arising out of a contention or holding that an International is free to violate its contract obligations to a local upon a charge that the local is following the Communist Party line. These federal constitutional issues were then promptly set forth in a Petition for Rehearing (pp. 9-12).

In the Petition for Rehearing by the Supreme Court of the State, petitioners again made the statement that the undisputed evidence established the International's (pp. 10-22, 36) endeavor to destroy the local, which statement once more went unchallenged. Of course, the federal Constitutional Points were also urged (pp. 48-52). So, in denying a hearing, the Supreme Court of California could have been acting neither on the assumption that the Court of Appeal had held that the trial court's findings of fact on this score were supported by the evidence nor that the respondents so contended. The California Supreme Court must, therefore, have followed its decision in *Black*. For it allowed to stand the holding of the Court of Appeal that the International had a right to breach its contract with a local which allegedly followed the Communist Party line and thereafter to enforce a forfeiture clause in the same contract against the same local.

The petitioners argue below that in addition to the breach of the contract by the undisputed attempt to destroy the union, the International had also breached the contract by the issuance of a new charter to another local. Whether or not the International as a matter of discretion had the right to issue a new charter in an area where an existing local was alleged to be following the Communist Party line, presented a question of contract interpretation—a purely state question and the court's finding that the issuance of the charter was justified for the reasons stated therefore involved no federal constitutional problems. That issue, which respondents now labor, is not before this Court. Respondents are merely using the issue as a gloss for obscruing and avoiding the real issue here upon which the judgment below is founded—the denial of the right of petitioners to urge an *undisputed* prior breach of the contract by the International rendering the forfeiture clause unenforcible, all because of the alleged "Communist influence" in the local union.

Even though, as the Courts below held, there was no breach of the contract between the parties by reason of the issuance of the new charter because the contract properly construed permitted such issuance, nevertheless the undisputed evidence establishes a breach by reason of the attempted destruction of the local. If there was a breach in the latter regard, it is immaterial that there was none in the former, as far as the constitutional questions in this petition are concerned. For they relate to the right with impunity to breach a contract on the grounds that a local is allegedly following the Communist Party line.

2. In the light of the foregoing, respondeats' attempt to question the jurisdiction of this Court to grant the

petition for writ of certiorari is without basis. Nothing in California procedure nor in this Court's procedure places any impediment to the resolution of the substantial federal questions here presented.

> "But there are situations where raising the federal questions for the first time in the petition for rehearing is timely. Thus if the question is created by an unexpected decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the particular federal question, the petition for rehearing constitutes his first and probably his only chance to present the matter to that court. Accordingly the federal question is timely raised and will support the exercise of Supreme Court jurisdiction. This is true even though the petition for rehearing is summarily denied without reference to the federal question."
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> Stern and Grossman, *Supreme Court Practice* (1954), p. 89.

See, *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U. S. 673; *Missouri ex rel. Missouri Ins. Co. v. Gehner,* 281 U. S. 313; *Saunders v. Shaw,* 244 U. S. 317; *Cole v. Arkansas,* 333 U. S. 196.

Respondents' citations are not apposite (Resp. Br. pp. 23-4). They deal with different situations which are not relevant here. One line of cases, like *Michael v. Louisiana,* ..... U. S. ..... (24 L. W. 4027), holds that a failure to comply with a specific state requirement for timely objection to the constitution of a grand jury, will preclude the right to raise the issue thereafter. Another line of cases holds that objections to the patent constitutionality of a statute should be made in the lower court and not for the first time on appeal. (*Edelman v. California,* 344 U. S. 357.) The third line of state cases holds

that a point not raised in the trial court will not be considered on appeal, just as this Court will not consider a question not theretofore presented. None of these cases are at all related to a situation in which the violation of federal rights first occurred in the appellate court following the announcement of a new state policy non-existent at the time of the trial.

Moreover, California itself recognizes no such stringent rule as respondents offer. Recognizing that the waiver of constitutional rights is not lightly to be implied, the courts have allowed claims of unconstitutional deprivation though not raised in the lower courts. "Like most general principles, those pertaining to the waiver of the right to challenge the constitutionality of a statute are subject to certain qualifications." (11 Cal. Jur. 2d, *Constitutional Law,* Sec. 73, p. 406. See *Echlin v. Superior Court,* 13 Cal. 2d 368, 90 P. 2d 63; *Mojave River Inv. Dist. v. Superior Court,* 202 Cal. 717, 262 Pac. 724; *Claremont Imp. Club v. Buckingham,* 89 Cal. App. 2d 32, 200 P. 2d 47.)

On the jurisdictional issue, what the respondents overlook is the following: (1) that the constitutional questions raised here could not have been anticipated in the trial court, since *Black v. Cutter Laboratories* was decided while the case was pending in the appellate court where the new state policy was made the basis for the affirmance of the trial court; (2) that this Court may always reexamine the undisputed evidence to determine whether federal rights have been denied;[1] (3) that the failure of

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[1]The holding of the Court of Appeal that the International had a right to do what it did plus the undisputed evidence of the International's breach of its contract with the local raise the constitutional problems urged in the Petition.

the state courts to apply undisputed state law to the undisputed evidence, which palpably established that respondents were without right to forfeit petitioners' property, was itself a denial of due process of law; and (4) that judicial sanction of a forfeiture of an associations' property solely because of alleged "Communist influence" raises serious federal questions which this Court is empowered to review. (See, Pet. p. 18, n. 6.)

3. In their reply to the Petition, as at all stage of the appeal herein, respondents do not challenge the showing made in the Petition that the uncontradicted evidence proved that after the International had embarked upon a plan to destroy the local and the International had failed and refused to either cease its attacks or to reply to the local's protests and requests for information as to its rights, the local withdrew from the International in self-defense. Nor do they question the validity of the Constitutional arguments as applied to these facts and the issues flowing from the holding that the International had the right to act as it did because the local allegedly followed the Communist Party line. They raise only questions of jurisdiction, which have been dealt with above, and arguments directed to issues not presented by the Petition.

In this connection, respondents give three reasons why no federal questions are raised. First, they note that the Court of Appeals did not cite any federal cases in its opinion. At best, this proves no more than that the federal questions raised were not considered by the State Court. More important, however, the Court of Appeal cites the *Black* case which, as respondents themselves note, "is replete with reliance upon decision of this Court and federal statutes" (Resp. Br. p. 25). Thus the Court of

Appeal indicated its reliance upon legal principles dependent upon decisions of this Court and federal statutes.

Second, it is noted that none of the Supreme Court Justices who dissented in *Black* dissented from the refusal to grant a hearing in this case. This establishes nothing more than that the Justices felt themselves bound by *Black,* even though they had dissented therefrom.

Third, counsel who just entered this case point to his support of the *Black* petition for certiorari. Counsel's avowal of his own consistency is hardly a reason for denying certiorari in this case.

These three tangental arguments are substituted for any contention either that petitioners have inaccurately summarized the record with respect to the International's attack upon the local or that the issues set forth in the petition as arising from the disposal of these facts by the Court of Appeal do not involve substantial federal questions. Instead respondents argue that the Court below correctly declared the principle of law that an International may pursuant to its contract with a local forfeit the property of the local in the event of its withdrawal from the International. This argument begs the issue in this case.

As is conceded in respondents' reply brief herein, the right to the forfeiture arises out of contract (Resp. Br. p. 27). That the International Constitution and the local's by-laws constituted such a contract here was alleged [Clk. R. 1, 9-10] and admitted [Clk. R. 42, 46] in the pleadings and accordingly found by the trial court [Clk. R. 74]. That this contract contemplates that a local may withdraw but that in event of a withdrawal it must

forfeit its property is clear.[2] The only question is whether the forfeiture clause may be enforced where the International has itself destroyed the very essence of its agreement with the local and thereby precipitated the disaffiliation. The state law that a forfeiture clause cannot ordinarily be enforced under these circumstances (Pet. p. 19) has not been questioned by respondents. Nor did the Court of Appeal hold that an International generally may breach its contract with a local, and thereafter declare a forfeiture of the local's property pursuant to that contract. What it did hold was that as International possesses these rights when the local involved is alleged to be Communist dominated. It is out of this situation that the serious constitutional issues set forth in the Petition originate.[3]

The Petition for Certiorari should be granted.

Respectfully submitted,

BEN MARGOLIS,

Attorney for Petitioners.

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[2]The constitution of the International treats the Local as a separate entity. Article XXXIX recognizes that under certain circumstances the Local may secede from the International. [Pltf. Ex. 1, p. 38.] Article XXXVIII provides for the suspension of a Local for non-payment of per capita tax, with the Local continuing in existence during the period of suspension, but denied "any benefits, privileges or protection of the International Union." [Pltf. Ex. 1, pp. 35-36.] If the Local were not a separate entity, it could not secede and it could not continue to exist when suspended from the International.

[3]The section of the reply brief dealing with the right of the International to issue a charter requires no answer because the question of that right presents only questions of contract construction. However, the right of an International to seek to wipe out a local, which it is bound by contract to protect, and still enforce that same contract, all on the ground that the local is alleged to be Communist dominated, is another matter—the one which the Petition presents for this Court's consideration.